Supreme Court, U.S.
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VOLUME 2 OF 2

No. _____

In The

SUPREME COURT OF THE UNITED STATES

JAYHAWK CAFÉ, LLC, (a Limited Liability Company) (Hui Yon Park, Sole Owner),	)))	PETITIONER
VS.		
COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD; CITY OF COLORADO SPRINGS, COLORADO A MUNICIPAL CORPORATION; and Board Members, LEE MCRAE, EDWARD PINE, ROBERT KEEL, MICHAEL NEMETH, MICHAEL NESTER, CHARLES STEPHENS AND LUKE TRAVINS; And KATHRYN M YOUNG, CLERK	)))))))))))))))	RESPONDENTS

On Petition for Writ of Certiorari to the Colorado Court of Appeals.

PETITION FOR WRIT OF CERTIORI

Attorney for Petitioner
David H. Zook (CO Registration 3031)
2020 N Tejon, Colorado Springs, CO 80907
(719) 632-2571

APPENDIX D

District Court, El Paso County
20 East Vermijo
Colorado Springs, CO 80903

Case No. 04CV1222

Plaintiff: JAYHAWK CAFÉ, LLC, dba The Dale Street Café,

Vs.

Defendant: COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD

Attorney or Party Without Attorney:
Jayhawk Café, LLC, by its sole Member, Hui Yon Park
2020 North Tejon St
Colorado Springs, CO 80907
Phone Number: 719-578-7998
Atty. Reg.: Pro Se

PLAINTIFF'S OPENING BRIEF

COMES NOW the Plaintiff, pro se, and respectfully submits the following Opening Brief:

STATEMENT OF THE CASE

Jayhawk Café, LLC, purchased the Dale Street Café on October 15, 2003, paid the fee of $1,400.00, and applied to the Colorado Springs Liquor and Beer Licensing Board for a transfer of the Café's hotel and restaurant liquor license. A hearing was eventually held on March 19, 2004 before said Board, at the conclusion of which the Board voted, five to one, to deny the transfer of the license to the applicant, Jayhawk Café, LLC.

Simultaneously to his moving " ... that we deny this transfer of license based on the applicant's ability to conduct the business according to law . . .". Board member Stephens agreed with Board member and chairman McRae that " she meets all the other criteria listed . . ". Said Board member Stephens:

> "The applicant, I believe, is of good moral character; the applicant is not a person legally prohibited as a licensee; the finances of the applicant are in good order; and the applicant has possession of the property".

On March 22, 2004, the Plaintiff, Jayhawk Café, LLC, brought this action pursuant to Rule 106 of the Colorado Rules of Civil Procedure, to set aside the Board's denial of its transfer application and for a stay pursuant to C.R.C.P. 65. On March 31, 2004, a hearing was held before Judge Samelson who issued a

preliminary injunction allowing Jayhawk Café, LLC to continue to operate under a temporary liquor permit pending this Court's final determination. In issuing the preliminary injection, Judge Samelson noted Ms. Park had testified that without the sale of liquor, the Dale Street Café would go out of business. He further noted the owner of the building where the Dale Street Café is located, David Zook, should have been allowed to participate in the hearing before the Board as an interested party, and that the Board's refusal to allow the same was error, making a remand for a new hearing "a probable chance".

STATEMENT OF FACTS

Plaintiff, Hui Yon Park, operates the Dale Street Café, a small bistro located near downtown Colorado Springs where it has served a loyal, older crowd for nearly twenty (20) years. It is popular for its eclectic American cuisine and fine wines, closing each evening by 9:00 p.m. It is unlikely law enforcement has ever been asked to respond to a disturbance or complaint in Dale Street's entire existence.

Hui Yon Park is a 49-year old naturalized Korean-American citizen who came to this country approximately 25 years ago. Because of Hui Yon, her parents, two brothers, two sisters and their families are now, too, citizens or legal residents hoping to share in a better life. Hui Yon Park, through her hard work, ambition and dream, has established and operated three exceptional restaurants which she has used to provide crucial jobs and financial assistance to her family.

Those three restaurants, the Tao Tao Tiffany Square, Genghis Khan, and Dale Street Café, were/are

restaurants catering to customers mostly in the 35 years and older. Tao Tao was established in 1996 and closed eight years later, in January of 2004. Genghis Khan opened in March of 2001 and closed in December of 2002. The Tao Tao Tiffany Square, located in what had largely become a vacant shopping center, was a victim of chain competition and location. The Genghis Khan, which opened to large crowds, ultimately could not compete with the influx of new restaurants downtown backed by big money, which was not available to the courageous but under-financed Ms. Park.

The liquor license of the Tao Tao Tiffany Square renewed without objection in October of 2003, and was surrendered just three months later on January 12, 2004. From the renewal of Tao Tao Tiffany on October 4, 2003 to the issuance of a temporary license to Ms. Park on October 16, 2003, and to the date of the hearing on the transfer request held March 19, 2004, no violations were alleged against Ms. Park or her entities.

Ms. Park applied for the transfer of license on October 16, 2003, paid her fee of $1,400.00, and the matter was set for hearing on November 21, 2003. A sign was posted on the premises of the applicant, the Dale Street Café. The date of the hearing was later reset at the City's request.

Only because Ms. Park reminded the office of the City Clerk that the premises must be re-posted, a new sign with the correct information (i.e. new date) was re-posted. Plaintiff points this out as an example of how easy it is for even the "experts" to overlook the requirements of the liquor code.

Ms. Park was subsequently requested by a police

detective to provide various records, fingerprints, bank accounts, etc. regarding the Dale Street Café, which she did. She also submitted to two interviews. For reasons never disclosed to Ms. Park, the hearing set for November 21, 2003 was rescheduled by the City Attorney/City Clerk two or three times. Ultimately, it was set for February 20, 2004. Again, no justification for the rescheduling was provided to Ms. Park. She can only surmise the three-month delay was to provide the City Attorney, Clerk's office and police detectives more time to conduct their "investigation".

Eventually, a hearing was held before the Liquor Board over Ms. Park's objection on March 19, 2004. Prior to said hearing, the City Attorney, on February 20, 2004, provided Ms. Park with an "Amended Notice of Objection and Proposed Denial" (attached as Exhibit A). Such "Notice" stated "objections have been received as a result of its investigation". Ms. Park's request to receive copies of such objections and to have the "objector" identified were refused by the City Attorney, City Clerk and police department. The objector remains anonymous.

> The Notice continued:
> "it has been made to appear to the Liquor and Beer Licensing Board . . . that application to transfer . . . should be denied".

Yet, at the hearing on March 19, 2004, no member of said licensing board acknowledged that said "objections" had been presented to the board, i.e. the statement by the City Clerk, obviously prepared by the City Attorney, "that objections had been presented to the Board and

the Board had determined Ms. Park's application should be denied" was false, according to the Board.

The notice concluded with an order, ostensibly, by the Licensing Board, that Ms. Park's LLC, d/b/a Dale Street Café, must appear and show cause why her application for transfer should not be denied for failure to "fully, faithfully, truthfully and fairly disclose other names . . . and . . . prior violations of the Colorado Liquor Code . . .". This show cause order was, according to the statements of the Board members, issued without the consent, knowledge or authority of the Licensing Board.

At the hearing held March 19, 2004, the prosecuting attorney conceded that the 'Order to Show Cause' was prepared by him and was inappropriate. That admission, however, did not prevent him from continuing to "prosecute" Ms. Park as if she were on trial.

Ms. Park's request for a rescheduling of the hearing which had been rescheduled by the City Clerk/City Attorney/police detective two or three times was denied. Thus, the hearing proceeded with the only issue before the Board being Ms. Park's alleged disclosures or omissions contained in her application. The actual "record" of any prior civil (as opposed to criminal) violation of the liquor code in the preceding eight (8) years was not noticed (charged) as an issue either troubling the Board or to be addressed.

Indeed, there was no reason for Ms. Park to prepare to defend or explain civil liquor violations which had already been addressed by the board in years past, and which were "water under the bridge". None of the

civil violations involved scienter, moral turpitude, or were probative of Ms. Park's moral character, nor did Ms. Park's history include any criminal convictions.

Ms. Park's civil history reflects three sales to a minor by an employee without her knowledge during approximately ten entity - years of operation. The last was at the Genghis Khan two and one-half years prior (November 11, 2001). Ms. Park twice since had renewed her license at the Tao Tao Tiffany Square without objection.

The other two civil violations of this nature occurred at the Tao Tao Tiffany Square; one was four and one-half years earlier (October 7, 1999), and the other four years earlier (February 9, 2000). Ms. Park had renewed her license at Tao Tao at least four times since such undercover stings and twice more at Genghis Khan. Ms. Park also had been cited on September 26, 2001, two and one-half years earlier, with failure to report a change in managers at Tao Tao Tiffany Square during the time she was preparing to open the Genghis Khan facility. Ms. Park had neglected to inform the City Clerk in writing that which the Clerk already knew, that she was no longer at the Tao Tao facility full time since the Genghis Khan had opened its doors. (See Appendix).

Finally, there were four instances (these are neither crimes nor civil violations) where Ms. Park had allowed the annual liquor license at Tao Tao to expire before seeking its renewal. In each instance, Ms. Park paid the severe late application fee of $500.00 as provided by statute (C.R.S. 12-47-302) and the license was renewed.

At the hearing held on March 19, 2004, Plaintiff requested an unbiased hearing officer be appointed to hear her transfer request. She also requested the matter be set over until the City Attorney and Clerk had complied with her discovery requests. These requests were denied. Plaintiff's landlord had previously requested in writing that he be admitted as a party to the proceeding and requested on the record that he be allowed to participate as an interested person. That request was denied.

The Board had previously received several letters of recommendation and support for Plaintiff's transfer requests, and several solid citizens appeared at the hearing to voice their high opinion of Ms. Park (see Exhibit B). No one appeared to object to the request, nor were any letters of objection received. The City Attorney's allegations that "objections had been received" were never substantiated, and the mystery objector was never identified or otherwise shown to exist.

SUMMARY OF ARGUMENT

C.R.S. 12-47-303 (1)(c), which governs liquor license transfer, provides that the licensing authority shall consider only the criteria set forth in C.R.S. 12-47-307 when acting on a transfer application. The City Attorney provided the Plaintiff, Jayhawk Café, LLC, written notice that the criteria at issue was that set forth in § (VI) which states:

> "No license . . . shall be issued to . . . any person unless such person's character, record and reputation are satisfactory to the respective licensing authority."

The notice alleged that Plaintiff's failure to provide certain disclosures would be the basis for proposed denial of her request for transfer.

At the conclusion of the hearing, all six Board members agreed the prosecuting attorney's assertion that Ms. Hui Yon Park was not of good moral character was not only unsupported by the evidence, the evidence, in fact, established the contrary. As opined by Board member Pine,

> "The applicant is of good moral character, and we all agree to that. Personally, I feel she is a hard worker and I watched her at Genghis Kahn and stuff like that, so I don't have a problem there."

Having in fact proven the assertion of bad moral character, record and reputation were unfounded, the Board's denial of the transfer application was so arbitrary as to constitute an abuse of discretion.

Further, the Board engaged in several procedural errors which, singularly and cumulatively, deprived the Plaintiff of due process, and requires reversal of its decision. These procedural errors include ordering the Plaintiff to "show cause", refusing to provide discovery (police reports), refusing to refer the matter to an unbiased hearing officer, misinterpreting the definition of "record" and misinterpreting the "record" itself, failure to make findings of fact, failure to follow its statutory responsibilities as a licensing agency, failure to allow other interested parties to participate in the hearing, utilizing the office of the City Attorney to both "prosecute" the Plaintiff-applicant and to advise the Board, and "punishing" the Plaintiff for alleged

violations occurring years earlier and for which sanctions had long ago been imposed and satisfied.

ARGUMENT

I.

THE INQUIRY OF THE BOARD WAS LIMITED TO THE NOTICE PROVIDED IN THE AMENDED NOTICE OF OBJECTION AND PROPOSED DENIAL

The prosecuting attorney served Plaintiff with an "Amended Notice of Objection and Proposed Denial" wherein he alleged in eighteen (18) separate paragraphs that Ms. Park had "failed to disclose" information including other names, violations of the Colorado Liquor Code, and violations of criminal laws rendering her of bad moral character and unfit to be a licensee.

After receiving the prosecuting attorney's "Notice", Ms. Park prepared and filed an amended application (see Exhibit C) explaining her lack of any intent to mislead the Board. At the hearing before the Board, Ms. Park fully explained the misunderstanding and said explanation was accepted by the entire Board. After listening to Ms. Park's testimony, the Board expressly found Ms. Park was of good moral character, effectively withdrawing the alleged basis for the prosecuting attorney's demand that her transfer request be denied.

Ms. Park's request for transfer should have been approved at that point. The Board, however, then went beyond the purview of its Notice to Plaintiff and C.R.S.

12-47-307, and began to focus on the alleged "violations" themselves, "violations" which had been addressed and handled years earlier. Indeed, Ms. Park had renewed her license at Tao Tao Tiffany Square twice and at Genghis Khan once without objection since the date of the last "violation" alleged (November 11, 2001). No change in circumstances since the date of Ms. Park's last renewal was shown to have occurred.

That the issue for the Board at a transfer hearing is limited to the applicant's character is reinforced in Rule 16.00, City Code, relating to "change of ownership". Said section provides that upon an application for transfer of a license due to change of ownership,

> "B. The City Clerk shall conduct an investigation into the character (only) of the applicant" (emphasis added).

In Westmark Asset Management Corp. v. Joseph, 37 P.3d 515 (Colo. App. 2001), the Court said:

> "Adequate notice reasonably conveys information that will allow a license applicant reasonable opportunity to prepare for a hearing . . ."
>
> "In determining whether a license applicant has been awarded procedural due process, there must be sufficient administrative and statutory standards and safeguards to protect against the exercise of unfettered discretion . . ."
>
> "In Hide-A-Way Massage Parlor, the Supreme Court held that an applicant for a massage parlor license was denied due process when the Board of County

> Commissioners used more stringent standards than those contained in the statute, without clearly defining them or giving applicants fair notice of what evidence it would consider in determining whether its requirements had been met." id. See also Price Haskel v. Denver Dept. of Excise, 694 P.2d 364 (Colo. App. 1984). Further, C.R.S. 12-47-312 (1) states that:
>
> "Not less than five days prior to the date of hearing, a local licensing authority shall make known its findings based on its investigation in writing to the applicant and other interested parties . . ."

In going beyond the allegations noticed in the Amended Notice of Objections and Proposed Denial and those allowed by C.R.S. 12-47-307, the Board denied Ms. Park the opportunity to prepare to meet, dispel, explain or otherwise counter such new and surprising allegations.

Due process dictated, at a minimum, she be given notice that her past history before the Liquor Board would be an issue at the scheduled hearing. C.R.S. 12-47-303 and 307 dictate that said history be limited to its relevance to the only question at hand, moral character. In going beyond the allegations noticed in the "Amended Notice of Objections and Proposed Denial", the Board erred.

II.
THE BOARD ERRED BY ITS FAILURE TO ENTER FINDINGS OF FACT

Rule 10.0 of the City Code states:

"A. In formulating a decision, the Board shall consider all the facts and evidence adduced as a result of the investigation and hearing, and after making findings of fact, shall apply these facts to the legal requirements which are applicable to the particular matter before it.

B. When the decision is made, the motion shall contain such findings of fact and conclusions of law as are relevant and necessary to support the decision . . . " (emphasis added).

The motion in the instant matter was "factually challenged" and clearly did not comply with the Rule:

"Mr. Stephens: I move that we deny this transfer of license based on the applicant's ability to conduct the business according to law."

This failure makes it impossible to weigh the reasonableness of the Board's decision and, likely, led directly to its erroneous decision. Indeed, shortly before the motion and the vote, several Board members indicated they "could go either way". Then, incredibly, after stating their vacillation on the record, and without making any adverse findings of fact, the Board, almost casually and nearly unanimously, voted to, in effect, put Ms. Park out of business.

Some of the statements leading up to the Board's vote are insightful. Board member Stephens, the proponent of the motion to deny, stated "I think 17

counts" (pg. 133) apparently referring to past civil violations. But, in fact, the figure was three times exaggerated.

At another point, chairman McRae misstates Ms. Park's testimony regarding her knowledge of the local rules, stating:

> ". . . the affidavit that she signed that said that she had read and understood the local rules as well as the State's rules and she hadn't even read them, it's just not taking - Mr. Chapman said something about she 'deserves the right'; it's not a right, it's a privilege." . . . it's a privilege to have this liquor license." (pg. 136).

Chairman McRae was mistaken on both counts. Ms. Park testified she had help reading the rules, i.e. someone read them to her, and "try to explain to me". (pg.. 73). This goes beyond just "reading them" by herself.

Further, the Colorado Court of Appeals has recognized that:

> "a liquor license is a property right which is entitled to due process protection, of which the minimum requirements include notice and opportunity to be heard". Price Haskel v. Denver Dept. of Excise, 694 P.2d 366 (Colo. App. 1984). See also Mr. Luckys, Inc. v. Dolan, 591 P.2d 1021 (Colo. 1979).

Justice Abe Fortas once observed, the history of democracy is very much the history of procedure. The importance of requiring findings of fact is elementary. Failure to comply wti this important procedural requirement by the Board constitutes a fatal error.

III.
REFUSAL TO COMPLY WITH REASONABLE DISCOVERY REQUEST WAS ERROR

Rule 7.00(A) of the City Code states:

> "(A). The City Clerk shall gather evidence for the preliminary investigation required by State law. The City Clerk shall make known these findings in writing . . . to the applicant and, upon request, to other interested parties as they are defined by State law.
>
> "The investigation by the City Clerk on behalf of the Board shall be with regard to the following matters:
>
> ". . . (6) This report shall include reports from appropriate law enforcement agencies of the applicant's previous criminal records, ..."

The City Clerk's investigation in this matter was conducted by detectives of the Colorado Springs Police Department. Twice, requests for continuance of the scheduled hearing was granted to the City to allow it

more time for its investigation. The Plaintiff/Applicant was twice interviewed by Detective Schutz, and provided the detective with access to bank records and other documents (i.e. the investigation was extensive).

The Court may judicially notice that any police officer involved in an investigation for a period of four or five months, necessarily, would have prepared reports if for no other reason than to justify/explain her use of time.

Such reports likely contain considerable positive and exculpatory or mitigating information about Ms. Park. For the prosecuting attorney to claim that no police reports exist is ludicrous and incredible as a matter of law.

Denying the Plaintiff discovery of the police reports constituted a fundamental denial of due process.

Further, Plaintiff's discovery request (Exhibit D) requested the City Clerk identify the person from whom "objections have been received". Obviously, the Plaintiff was entitled to interview and otherwise examine such persons and to establish whether, in fact, such person even existed. Indeed, no evidence surfaced to support the prosecuting attorney's allegations.

Denial of the Plaintiff's discovery requests was error.

IV.
GOOD CAUSE DID NOT EXIST FOR DENIAL OF THE TRANSFER REQUEST

The test for the Board's action is one of "good cause". C.R.S. 12-47-103(9)(b) defines "good cause" to

mean:

> "The licensee or applicant has failed to comply with any special terms or conditions that were placed on its license in prior disciplinary proceedings or arose in the context of potential disciplinary proceedings."

What such definition suggests, then, is that the relevance of any prior disciplinary proceedings is limited to whether the applicant served out her discipline in acceptable fashion. Ms. Park did! No one has suggested otherwise! Thus, to dredge up past successfully completed disciplinary matters as a basis for future action by the Board is not appropriate.

C.R.S. 24-5-101 states:

> ". . . the fact that a person has been convicted of a felony or other offense involving moral turpitude shall not in and of itself prevent the person from applying for and receiving a license required by the laws of this State to follow any business, occupation or profession."

Thus, even a convicted felon cannot be denied a business license simply because of, even, his criminal record.

In this matter, the alleged "violations" were stale in time and had in fact been deemed irrelevant by past Board action, inasmuch as the Board had granted Ms. Park several license renewals subsequent thereto. To claim same as a basis for denial at this late date was the height of capriciousness and constitutes error.

V.

THE BOARD ERRED IN MISINTERPRETING MS. PARK'S "RECORD"

One Board member, Mr. Stephens, suggested that Ms. Park had seventeen past violations of the Liquor Code. He was incorrect, but his misinterpretation and that of others had a profound effect upon the Board's ultimate decision to deny the transfer request.

Perhaps much of the Board's misunderstanding of Ms. Park's "record" was the misinformation it received from the City prosecutor. The prosecutor insisted that Ms. Park had been tardy in renewing her license on five (5) occasions and that this constituted five (5) violations.

In fact, a licensee is under no obligation to renew her license. A licensee may, indeed, let its license expire. A licensee may also apply for a late renewal under C.R.S. 12-47-302 (2)(a) upon payment of up to a $500.00 late application fee. Ms. Park did this on several occasions. While it may not be fiscally wise, the application for a late renewal is neither a criminal nor a civil violation of the Liquor Code.

The Board's legal conclusion that Ms. Park would be unable to operate her business in a lawful manner despite more than a decade of experience was without evidentiary support and was, in fact, preposterous.

VI.
REFUSING TO ALLOW OTHER INTERESTED PARTIES TO PARTICIPATE WAS ERROR

Rule 9.06A of the City Code states:

> "Applicants or other interested parties as defined by the State Liquor Code may appear in person . . ."

An interested person is defined in Rule 8.01 (A), footnote 2, of the City Code, as:

> "Interested person" means any of the following . . . (2) an adult resident of the neighborhood under consideration; (3) the owner or manager of a business located in the neighborhood under consideration . . ."

C.R.S. 12-47-311 (5) states:

> "(a) at the public hearing held pursuant to this section, any party in interest shall be allowed to present evidence and to cross-examine witnesses.
>
> (b) as used in subsection (5), 'party in interest' means any of the following:
>
> " . . . an adult resident of the neighborhood under consideration . . . the owner or manager of a business located in the neighborhood under consideration . . ."

David Zook, both a resident of the neighborhood and the owner of a business, to wit, the building where the Dale Street Café is located, both orally and in writing requested that he be permitted to present evidence and cross-examine witnesses, but was denied by the Board's chairman.

Because Mr. Zook was denied the right to participate, prejudice is to be presumed. Indeed, each and every allegation of fact contained in this brief would have been established or corroborated by Mr. Zook's

presentation of evidence and his direct and cross-examination of witnesses.

At the hearing on Plaintiff's request for a preliminary injunction, Judge Samelson found that this error, alone, gave rise to a reasonable probability of success on appeal (see Exhibit E).

VII.
REFUSAL TO APPOINT AN UNBIASED HEARING OFFICER WAS ERROR

The prosecuting attorney approached the transfer hearing application as if he were prosecuting Ms. Park for a violation. Indeed, he admitted the issuance of a show cause order was improper. Nevertheless, the show cause order stated that the Board had already considered evidence and reached a conclusion even before the transfer hearing commenced.

Rule 4.10 of the City Code states:

> "When the Board sits as a quasi-judicial body and is required to make findings of fact and act upon evidence presented to them, no member shall receive or solicit comments from any person regarding an agenda item prior to the public hearing at which the item is 'discussed'".

It is obvious the Amended Notice of Objection and Proposed Denial (Exhibit A) demonstrates a prima facie violation of said rule and creates, at least, a serious appearance of impropriety.

Rule 2.03 of the City Code provides for the appointment of an unbiased hearing officer. The Board's failure to do so when timely requested by the Plaintiff, both in writing and orally, was error.

VIII.
THE CONDUCT OF THE PROSECUTING ATTORNEY PREJUDICED THE PLAINTIFF BEFORE THE BOARD

The prosecuting attorney admitted that the show cause order was in fact ordered by him without, he said, the knowledge or consent of the Board. Every member of the Board stated they were unfamiliar with the order, had not seen it, nor had they authorized it.

Since the identity of the author of any objection which the prosecuting attorney claimed "had been received by the Board" was never disclosed, we can only assume that either no such person ever existed or that person was the prosecuting attorney himself.

C.R.S. 24-4-105 (6) provides:

> "No person engaged in conducting a hearing or participating in a decision or an initial decision shall be responsible to or subject to the supervision or direction of any office, employee or agent engaged in the performance of investigatory or prosecuting functions for the agency" (emphasis added).

Either the prosecuting attorney or the police officers or the City Clerk or all three made the initial

decision to deny Ms. Park's application for a transfer, directly in conflict with said statute. Further, both the prosecuting attorney and the legal advisor to the Board are members of the same firm, i.e. the Office of the City Attorney.

A conflict would seem to exist! Such conflict had a direct impact on the Board's action as well as gives the proceedings an appearance of impropriety.

CONCLUSION

C.R.S. 24-4-101.5 states:

> "Legislative declaration. The general assembly finds that an agency should not regulate or restrict the freedom of any person to conduct his or her affairs, use his or her property, or deal with others on mutually agreeable terms unless it finds, after a full consideration of the effects of the agency action, that the action would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of this state. The general assembly also finds that many government programs may be adopted without stating the direct and indirect costs to consumers and business and without consideration of such costs in relation to the benefits to be derived from the programs. The general assembly further recognizes that agency action taken without evaluation of its economic impact may have unintended effects, which may include barriers to competition, reduced

> economic efficiency reduced consumer choice, increased producer and consumer costs, and restrictions on employment. The general assembly further finds that agency rules can negatively impact the state's business climate by impeding the ability of local businesses from moving to this state, and by hindering economic competitiveness and job creation. Accordingly, it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of continuing agency actions to determine whether the actions promote the public interest."

It is apparent that the Colorado Springs Liquor and Beer Licensing Board has no concern for the impact of its seemingly casual and blatantly arbitrary action, the result of which will terminate Ms. Park's right, privilege, dream . . . whatever we call it, it will be foolishly and needlessly squelched if the Board's action is not reversed.

This Board, it appears, simply does not understand its mission, nor, it is apparent, do its agents and legal advisors. There are many ways a licensing agency can assist those entrusted to its jurisdiction, but this agency prefers to erect obstacles.

To deny an ambitious, hardworking, highly moral Korean immigrant her opportunity to provide a wonderful and unique business asset to our community reveals a lack of perspective that boggles the imagination.

The Board's actions clearly do not "benefit the public interest" or "encourage the benefits of a free enterprise system". Obviously, this action by the Board is contrary to the public interest, it will deprive citizens of a wonderful place to wine and dine, it will destroy Hui Yon Park's business, and with it the jobs of her employees, the assistance she provides to her family, the substantial tax revenue she contributes, the income to her suppliers, etc.

The misguided action of the prosecuting attorney (who recommended it) and the Board constitutes a manifest abuse of discretion and a violation of due process.

Plaintiff requests this Court remand this matter with instruction to approve the transfer request based upon the record before it or, in the alternative, that a new hearing be ordered before an impartial hearing officer.

DONE this ____ day of November, 2004.

Respectfully submitted,

_____

Jayhawk Café, LLC, by Hui Yon Park,
sole member
2020 North Tejon Street
Colorado Springs, CO 80907
(719) 635-3611

APPENDIX E

COLORADO COURT OF APPEAL
2 East 14th Avenue, Suite 300
Denver, CO 80203

District Court, El Paso county, Colorado
The Honorable Robert L. Lowrey
Case No. 04CV1222

Appellants:

COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD, CITY OF COLORADO SPRINGS, COLORADO, a municipal corporation; AND BOARD MEMBERS, LEE MCRAE, EDWARD PINE, ROBERT KEEL, MICHAEL NEMETH, MICHAEL NESTOR, CHARLES STEPHENS AND LUKE TRAVINS; AND KATHRYN M. YOUNG, CLERK

v

Appellee:

JAYHAWK CAFÉ, a Colorado Limited Liability Company

ANSWER-OPENING BRIEF (Partial)

STATEMENT OF ISSUES FOR REVIEW

APPEAL

I. Did the Trial Court err in finding a denial of due process?

CROSS-APPEAL

II. Did the Trial Court err in finding that Appellee's landlord was not a "party in interest?"
III. Did the Trial Court err in finding the Board made sufficient findings of fact?
IV. Was the Board's refusal to comply with Appellee's discovery request a denial of due process?
V. Did good cause exist for the Board's denial of the transfer request?
VI. Did the Board misinterpret Ms. Park's "record"?
VII. Should the Board's inquiry have been limited to the notice provided in the Amended Notice of Objections and Proposed Denial?
VIII. Was Appellee's cross-appeal timely filed?

III.
THE TRIAL COURT ERRED IN FINDING THE BOARD MADE SUFFICIENT FINDINGS OF FACT.

Rule 10.0 of the City Code states:
A. In formulating a decision, the Board shall consider all the facts and evidence adduced as a result of the investigation and hearing, and after making findings of

fact, shall apply these facts to the legal requirements which are applicable to the particular matter before it. B. When the decision is made, the motion shall contain such findings of fact and conclusions of law as are relevant and necessary to support the decision..." (emphasis added).

The motion in the instant matter was "factually challenged" and clearly did not comply with the Rule:

"Mr. Stephens: I move that we deny this transfer of license based on the applicant's ability to conduct the business according to law." (Tr. P. 138) this failure makes it impossible to weight the reasonableness of the Board's decision and, likely, led directly to its erroneous decision. Indeed, shortly before the motion and the vote, several Board members were clearly undecided. (Tr. P. 132) Then, incredibly, after stating their vacillation on the record, and without making any adverse findings of fact, the Board, almost casually and nearly unanimously, voted to, in effect, put Ms. Park out of business.

Some of the statements leading up to the Board's vote are insightful. Board member Stephens, the proponent of the motion to deny, stated "I think 17 counts" (pg 133) apparently referring to past civil violations. But, in fact, the figure was three times exaggerated.

Board member Pine opined that Appellee had been in front of them eleven (11) times (Tr. P. 133), another gross exaggeration.

It should be noted that the Board never saw and therefore never actually considered any exhibits, including the so called record of Ms. Park. As the City

prosecutor said, "we haven't actually discussed any of these exhibits (tr. P. 75). Thus we do not know which "violations" the Board relied upon. We do not know if the Board found that Appellee's "failure to renew" is a violation and whether the board as a whole counted same as five (5) different violations.

We do not know whether there was a finding of change in circumstance that somehow rendered the several previous renewals by the board on the identical record erroneous, ie., there is absolutely no factual consensus by the Board. Without findings of fact, the Board's decision, which appears arbitrary and capricious, must be presumed so.

Justice Abe Fortas once observed, the history of democracy is very much the history of procedure. The importance of requiring findings of fact is elementary. Failure to comply with this important procedural requirement by the Board led directly to the Board's inexplicable action and constitutes a fatal error.

V.
GOOD CAUSE DID NOT EXIST FOR DENIAL OF THE TRANSFER REQUEST

The test for the Board's action is one of "good cause". C.R.S. 12-47-103(9)(b) partially defined "good cause" to mean:

"The licensee or applicant has failed to comply with any special terms or conditions that were placed on its license in prior disciplinary proceedings or arone in the context of potential disciplinary proceedings."

What such definition suggests, then, is that the relevance of any prior disciplinary proceedings is limited to whether the applicant served out her discipline in acceptable fashion. Ms. Park did! No one has suggested otherwise! Thus, to dredge up past successfully completed disciplinary matters as a basis for future action by the Board is not appropriate.

C.R.S. 25-5-101 states:

"...the fact that a person has been convicted of a felony or other offense involving moral turpitude shall not in and of itself prevent the person from applying for and receiving a license required by the laws of this State to follow any business, occupation or profession."

Thus, even a convicted felon cannot be denied a business license simply because of, even, his criminal record.

In this matter, Ms. Park has no criminal convictions, the alleged "violations" were stale in time and had in fact been deemed irrelevant by past Board action, inasmuch as the Board had granted Ms. Park several license renewals subsequent thereto. To claim same as a basis for denial at this late date was the height of capriciousness and constitutes error.

APPENDIX F

COLORADO COURT OF APPEALS
2 East 14th Avenue, Suite 300
Denver, CO 80203
CASE No. 05CA508

District Court, El Paso County, Colorado
The Honorable Robert L. Lowrey
Case No. 04CV1222

Appellants: COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD, CITY OF COLORADO SPRINGS, COLORADO, a municipal corporation; AND BOARD MEMBERS, LEE MCRAE, EDWARD PINE, ROBERT KEEL, MICHAEL NEMETH, MICHAEL NESTOR, CHARLES STEPHENS AND LUKE TRAVINS; AND KATHRYN M YOUNG, CLERK

V

Appellee: JAYHAWK CAFÉ, a Colorado Limited Liability Company

Attorney for Appellee Jayhawk Café

David H. Zook
2020 N Tejon
Colorado Springs, CO 80907
Telephone 719-632-2571
Atty Reg #3031

PETITION FOR REHEARING

PETITION FOR REHEARING

Comes now the plaintiff-appellee, Jayhawk Café, by counsel, and moves the Court for a rehearing or modification of its opinion entered herein.

As grounds therefore, Jayhawk states that the Court has overlooked or misapprehended important facts and misapprehended critical points of law leading to its erroneous, unfair and largely unsupported reversal of the District Court's judgment.

STANDARD OF REVIEW

While the opinion correctly states that the Board's decision is to be upheld unless it is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority; it is also true that such a test cannot be applied in a vacuum. E.g., "good cause" to deny an application is the standard against which the Board's action must be measured in a renewal hearing. I.e., were the issue at hand an appeal involving the Board's denial of a renewal application, the Court would look to see if there was competent evidence to support the Board's finding that "good cause" existed to deny the application (See CRS 12-47-302(1) and Squire Restaurant v. City of Denver, 890 P.2d 164 |(Colo. App. 1994).

If good cause (based upon certain criteria) is not also the standard in transfer hearings, what is?! Without even this basic, primary standard to guide the Board and the applicant, due process will be lacking.

This Court ought to state what the standard (burden of proof) for denial of a transfer application is and apply same to the instant matter. To simply state that the Court must uphold the Board's decision unless it is devoid of evidentiary support simply begs the question.

In Elizondov. State, 194 Colo. 113; 570 P.2d 519 (1977), the Court quoted Mini Mart Inc. v. City of Minot, 347 N.W. 2d 131 (N. D. 1984), stating,

" we hold only that a municipality must reserve its legislative branch of discretion through the use of written criteria which both adequately inform applicants of the standards and policies to be contemplated by the municipality and adequately guide the licensing authority in arriving at its decision. Aside from any Constitutional consideration, fundamental fairness would seem to require nothing less." See Squire restaurant v. City of Denver, supra. Thus, not only must a broad standard be established and followed, the broad Standard must be the sum of definitive written criteria. E.g., if the number of violations an applicant has accumulated is important for renewal or transfer purposes, there must be objective, written, published standards established so that all applicants are treated equally and all have notice of the kinds and numbers of " violations" which would result in a denial. Much the same as a licensed driver is made aware of the kinds and numbers of violations which will result in his driving privileges being denied.

Here, no standard was established or utilized by the border against which it could weigh the "record" of Ms. Park. Indeed, Ms. Park's record might well be exemplary when compared with other, current licensees.

Because the board lacks standards, it is impossible for a reviewing court to fine the board's action was supported by any competent evidence.

DUE PROCESS

In Mountain States Telephone v. Dept. of Labor, 184 Colo. 334, 520 P.2d 586,(1974) the Court said,

"The essence of procedural due process is fundamental fairness..... these principles apply no less to quasi-judicial proceedings where a property write is subject to a direct and material infringement."

And in Prince Haskell Inc. v.Denver Dept. of Excise, 694 P2nd 364, (Colorado App. 1984), the Court declared,

"A liquor license is a property right. As such, an applicant for a liquor license is entitled to due process protection, including notice, which reasonably conveys enough information to allow preparation for a hearing. Id.

It is of note that the board remained confused on this issue as its chairman referred more than once to the " fact" that a liquor license was a " privilege". This was a serious misapprehension, yet it is unmentioned by the Court

The court misapprehended the Jayhawk due process challenge. Indeed, while the board failed to follow its own rules on numerous occasions (all of which

the court excuses'), the test of due process of course a constitutional one, independent of the local rules of the board.

Indeed, at least three tenets and due process are one, a neutral magistrate two; findings of fact; three, recognized standards to be applied to the issues at hand. Whether the board followed its own rules (which it did not) is of no moment if the rules do not comport with due process. Of course, when the rules are violated, a violation per se of due process would seem apparent.

Here, as the district court found, the magistrate was anything but neutral. The board was provided the City Attorney's opinion and recommendation prior to the hearing. The city attorney further falsely stated that it had received objections to the transfer request when in reality only letters of support had been received. To compound that outrage, the board was not apprised of the letters of support in the city attorney's report made available to them prior to the hearing. The report was totally negative. Obviously, it should have contained the good along with the bad. In a Lockhart v. Board of Education, 668 P2d 959,(Colo. Apps. 1983), the court found under analogous circumstances that the prosecutor presenting the matter to the board made an egregious invasion of the board's decision making province; in a holding that the prosecutor's extensive influence upon the board's deliberations resulted in a due process violation.

Here, the prosecutors inappropriate influence tainted the process from the beginning. Is unsolicited preparation of a document improperly ordering Ms. Park "to show cause" was a total reflection of his own views indirectly led to Jayhawks due process denial.

The court inexplicably rejected Jayhawks contention that Local rule 16.00 required the amended notice (report) be written on a form supplied by the state. This is puzzling. The rule is clear. The court then charges Jayhawk with producing the required report form! That is not Jayhawks burden. It is enough to establish the violation. Prejudice can be presumed.

The court states that local rule 4.10 does not prohibit the board members from receiving information regarding the transfer request prior to its scheduled hearing. But the rule clearly states otherwise. The cardinal rule of statutory construction is that a statute which is clear and unambiguous is not subject to interpretation or construction. Husson v. Meeker, 812 p.2d 731 (Colo. App. 1991). Rule 4.10 is clear.

For the court to say that giving Rule 4.10 its obvious interpretation would lead to an absurd result seems disingenuous. There is nothing absurd about withholding from the quasi- judicial board information going to the merits of the issue they will soon address in an open forum. Indeed, if rule 4.10 did provide for the kind of exparte contact by the prosecution with the board as took place in the instance matter, the rule

would clearly clash with the requirements of due process, and that is what is important to understand.

C R C P, 52 requires a court, in matters tried to it as the fact finder to make findings of fact. In reviewing a trial courts judgment this court said, "Procedural due process requires in these instances findings of fact be made on the record for informed appellate review." H 20 Engineering Inc. v. Leidys Inc., 799 P.2nd 432(Colo. App. 1990). See also People in the interest of C.J.W., 727 P2d 870 (Colo. App. 1986).

Thus, the requirement that a quasi- judicial body make explicit findings of fact is more than statutory, it is a matter of due process.

PARTY IN INTEREST

The court states without citing any authority that transfer applications are excluded from the requirements of CRS 12-47-311. This to seems disingenuous. While the statute does not require a hearing be set, it does not exempt from its procedural requirements a hearing which is to be held. Interestingly, the court does not say where one ought to look for guidelines as to how the hearing held in this instance should be conducted if not pursuant to CRS 12-47-311.

A reading of the record and it'll local rules however, clearly established that the contemplated

hearing is intended to permit interested parties or parties in interest to participate.

First, the record establishes the property was posted with a notice stating,"....any interested person may appear to be heard, either for or against ....."

Further, Local Rule 16. 00 requires that notice of the required hearing be posted on the property. It does not state the requirements of the notice posted but Local rule 6.03, the only local rule addressing such requirements, states that the notice shall be in compliance with CRS 12-47-311. Thus, it is apparent that both the state liquor code and the local rules have one notice and one procedure with regard to hearings for new licenses, renewals and transfers and that is set forth in CRS 12-47-311.

Further, Local Rule 16.02, also addressing transfers (by operation of law) states that "...the Board shall act on the transfer request considering the evidence presented by the applicant and any party in interest...."

Further, Local Rule 11.02 provides that, "any interested party" may appeal the board's decision to the district court.

Is abundantly clear that the local rules contemplate participation in the hearing by interested parties, interested persons or persons in interest. For

the Court to hold otherwise requires a very large stretch, to the point of being, even, incredulous.

FINDING OF FACT

Once again the Court excuses the board's failure to follow its own rules. Local Rule 1 0.01 provides, "A. In formulating a decision The Board shall consider all the facts and evidence adduced as a result of the investigation and hearing, and after making findings of fact, shall apply these facts to the legal requirements which are applicable to the particular matter before it.

"B. When the decision is made, the motion shall contain such findings of facts and conclusions of law as our relevant and necessary to support the decision. The motion shall be made orally or in writing. The city clerk may be requested to prepare a written motion for subsequent presentation and consideration by the board. (emphasis added)

The court, in its opinion, makes a curious statement that, ".... an oral motion was made that contained the board's conclusion of law based on its finding of fact. "

Of course, the board made no finding of fact, none! The court's statement to the contrary is without any support. A cardinal rule of appellate review is that a verbatim transcript is not a substitute for findings of fact. If the board did indeed make findings of fact, even a finding of fact, what is it?

Again, the obvious strikes this council as disingenuous. If there was a finding of fact made, the opinion would identify it. Instead, the court refers to Ms. Park's attitude, that she is not suffiently impressed with the gravity of her technical and contrived violations. The court quotes her honest exasperation with her employees for falling for the unprofessional and unnecessary ploys utilized in the three controlled buys (see letter of Greg Olson). Indeed, can a board deny a license based on its misperception of an applicant's attitude?

Findings of fact were particularly important to this case as the record indicates many differing an erroneous opinions by the various members of the board as to what Ms. Park's "record" was. This Court correctly summarizes Ms. Park's "record" on page 19 of its opinion when it states, "...the violations included selling liquor to minors (not Ms. Park personally), failing to report a change in management and selling liquor without a license (by overlooking the renewal date)..." a total of three technical violations and three controlled buys from employee' at two establishments over 10 entity year's.

However, one board member thought Ms. Park had 17 past violations. Another said she had been "before" them 11 times. Another, during the concluding discussion repeated that a liquor license is a privilege not a right. The point is, there was no meeting of the minds as to what Ms. Park's record was or more

importantly, what was the standard to which she and every other applicant are to be held.

In Squire Restaurant v. City of Denver, 890 P2d 164 (Colo. App. 1994) the court quoted from Elizando v. State, supra,

"...although the hearing officer's integrity is not questioned, in this case as in every other, there is no way for a reviewing court to determine whether a hearing officer has or has not abused his discretion. Without some stated guidelines and specific findings of fact, a judicial review is a hollow gesture.

"... nor is there any assurance that each hearing officer will not, consciously or subconsciously, follow standards quite different from his colleagues." id.

This court would take Ms. Park to task for not always following the rules, yet excuses the board completely for its failures to follow its rules on several occasions. To excuse the board's failure to make findings of fact, however, is simply not within the court's purview. As Judge Tursi once noted in dissent, "... when findings are mandated, they cannot be ignored...." People in the interest of CJW, 727 P2nd 870.(Colo App. 1986).

The lack of meaningful, collective, factual findings by the Board constituted a manifest abuse of discretion.

ESTOPPEL

The opinion is completely silent on this important issue. The Court points out that Ms. Park admitted to three violations of selling liquor to minors but doesn't disclose that such violations were spread over 10 entity years at two establishments, the last occurring two and a half years earlier. Nor does the opinion mention that Ms. Park had been relicensed three times since by this board.

Nor does the opinion mention that said violations were not committed by Ms. Park herself, but by her employees; or that Ms. Park admitted to same as part of an agreement with the board wherein the penalty of a short suspension was stipulated to. Obviously Ms. Park would not have entered into such agreements had she known the board would later renege on her bargain in attempt to impose, instead, a suspension for a lifetime.

At oral argument, counsel for the board told the court that the doctrine of estoppel does not apply. He was incorrect. Indeed, a municipality is estopped from taking a position contrary to previous representations' reasonably relied upon by a person dealing with the city to her detriment. See P-W Investments Inc. v. City and Westminster, 665 P2nd 1365 (Colo. 1982).

Here, Ms. Park was told if she successfully complied with the terms of the agreement, and no additional penalty would be imposed. She complied. How arbitrary, capricious and unfair to now deny Ms. Park the business she has invested in on the basis of very old negotiated dispositions long ago satisfied.

As stated in Roderick v. The City of Colorado Springs, 193 Colorado 104, 563 P2nd 3, 1977, the doctrine of the equitable estoppel is invoked against public entities to prevent manifest injustice.

The injustice to Ms. Park is obvious.

CONCLUSION

Hopefully, upon reflection, the onerous due process violations suffered by Ms. Park will become more apparent to the court. The city has prosecuted this pointless and expensive appeal because it knows that any detached, neutral magistrate undoubtedly would grant Ms. Parks application for a license so she may continue to operate her small, delightful bistro café.

Fundamental fairness dictates that this court remand this matter with directions to approve Jayhawk's application.

Respected fully submitted,

_____

David H. Zook
Attorney for Appellee

APPENDIX G

Supreme Court of Colorado
2 East 14th Avenue
Denver, CO 80203

Colorado Court of Appeals, Division VI NO 05CA0508
Judges Carparelli, Webb and J. Jones

Petitioner:
JAYHAWK CAFÉ, a Colorado
Limited Liability Company

v.

Respondents:
COLORADO SPRINGS LIQUOR AND BEER LICENSING BOARD,
CITY OF COLORADO SPRINGS, COLORADO, a municipal corporation; AND BOARD MEMBERS, LEE MCRAE, EDWARD PINE, ROBERT KEEL, MICHAEL NEMETH, MICHAEL NESTOR, CHARLES STEPHENS AND LUKE TRAVINS; AND KATHRYN M. YOUNG, CLERK

Case No. 07SC177

PETITION FOR WRIT OF CERTIORARI

Comes now the petitioner Jayhawk Café, LLC, by counsel, David H. Zook, and requests a review on a writ of certiorari of Colorado Court of Appeals opinion in Case No. 05CA0508.

I.

Advisory Listing of Issues Presented for Review

---

1. Was petitioner denied due process by the failure of the Liquor Licensing Board to make required findings of fact; provide meaningful standards for the granting or denial of a license transfer; appoint a neutral magistrate after receiving negative information ex parte; follow several other requirements of its own rules and state statutes.

2. Can a liquor board deny a license transfer request based solely upon an applicant's record of negotiated dispositions of purported violations of the liquor code occurring over ten entity years and when, additionally, the applicant had been re-licensed three times since the last occurrence?

3. When a hearing is held on a liquor license transfer request, the subject property posted, and "interested parties" are invited to participate, must the liquor board allow such parties to participate?

II.

Grounds

The grounds upon which petitioner seeks this review are as follows.

1. The Court of Appeals has decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court and the Court of Appeals itself.

2. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its power of supervision.

3. The Court of Appeals has refused to determine a question of first impression.

4. The court of appeals has ignored an important question properly raised and preserved by petitioner and in doing so has misrepresented the factual record.

III.

Important Dates

The date the court of Appeals announced its opinion was December 28, 2006.

The Court of appeals denied petitioner's petition for rehearing on February 8, 2007.

IV.

Statement of the Case

Petitioner, Jayhawk Café, LLC, operates the Dale Street Café, a small bistro located near downtown Colorado Springs where it has served a loyal, older crowd for nearly twenty (20) years. It is popular for its eclectic American cuisine and fine wines, closing each evening by 9:00 p.m.

Hui Yon Park, a 50 year old naturalized Korean-American citizen is the owner of Jayhawk. Ms. Park, through her hard work, ambition and dreams established and operated several exceptional restaurants over the course of approximately a decade and a half. Tao Tao was operated from 1996 to 2004. Genghis Khan opened in March of 2001 and closed in December of 2002 the victim of fierce, downtown competition. The Dale Street Café has operated from October, 2003 to present.

The liquor license of the Tao Tao Tiffany Square was renewed without objection in October of 2003, the same month Ms Park applied for a transfer for the Dale Street Café. A hearing was held before the Liquor Board on March 19, 2004. Prior to said hearing, the City Attorney, provided Ms. Park with an "Amended Notice of Objection and Proposed Denial". Such "Notice" stated, "objections have been received as a result of its investigation." This accusation by the City Attorney

proved false as no objections were ever revealed at the hearing.

The notice concluded with an order, ostensibly, by the Licensing Board, that Ms. Park's LLC, d/b/a Dale Street Café, must appear and show cause why her application for transfer should not be denied for failure to "fully, faithfully, truthfully and fairly disclose other names...and...prior violations of the Colorado Liquor code...".

At the hearing held March 19, 2004, the prosecuting attorney conceded that the 'Order to show Cause' was inappropriate. Thus, the hearing proceeded with the only issue before the Board being Ms. Park's alleged disclosures or omissions contained in her application. The actual "record" of any prior civil violation of the liquor code in the preceding eight (8) years was not noticed (charged) as an issue either troubling the Board or to be addressed.

Indeed, there was no reason for Ms. Park to prepare to defend or explain civil liquor violations which had already been addressed by the board in years past, and which were "water under the bridge". None of the civil violations involved scienter, moral turpitude, or were probative of Ms. Park's moral character, nor did Ms. Park's history include any criminal convictions.

The alleged failure to disclose was proven to be a misunderstanding.

At the conclusion of the hearing, the board agreed that,

"The applicant, I believe, is of good moral character; the applicant is not a person legally prohibited as a licensee; the finances of the applicant

are in good order; and the applicant has possession of the property."

The board then voted 5 to 1 to deny Ms. Park a license transfer "based on the applicant's ability to conduct the business according to law."

On March 22, 2004, the Appellee, Jayhawk Café, LLC, brought an action pursuant to Rule 106 of the Colorado Rules of civil Procedure, to set aside the Board's denial of its transfer application and for a stay pursuant to C.R.C.P. 65. On March 31, 2004 a preliminary injunction was issued allowing Jayhawk Café, LLC to continue to operate under a temporary liquor permit pending the Court's final determination. In issuing the preliminary injunction, the Court noted the owner of Jayhawk had testified that without the sale of liquor, the Dale Street Café would go out of business. He further noted the owner of the building where the Dale Street Café is located should have been allowed to participate in the hearing before the Board as an interested party.

The District Court subsequently concluded the Appellee had not been provided procedural due process at the hearing before the Board and remanded the matter for a new hearing before an impartial hearing officer, to wit a municipal judge.

The City Attorney appealed the District Judge's decision and on December 28, 2006, the Court of Appeals reversed the District Court.

V.

Argument

1. Due Process Denied

(a.) No Findings of Fact

Local Rule 10.01, states,

"A. In formulating a decision the Board shall consider all the facts and evidence adduced as a result of the investigation and hearing, and after making findings of fact, shall apply these facts to the legal requirements which, are applicable to the particular matter before it."

"B. When the decision is made, the motion shall contain such findings of facts and conclusions of law as are relevant and necessary to support the decision. The motion shall be made orally or in writing..."

The Court of appeals states in its opinion, "here, an oral motion was made that contained the Board's conclusion of law based on its findings of fact." (p. 15). The Court misspeaks, indeed no finding of fact was agreed upon , only a conclusion of law!

Findings of fact are particularly important when dealing with multi-member boards and were particularly important to this case as the record indicates many differing and erroneous opinions by the various board members as to what Ms. Park's "record" was. Ms. Park's actual record included three controlled buys from employees (not Ms. Park) and three technical

violations at two different establishments over 10 entity years. That's one controlled buy and one technical violation every 3 ½ years!

However, one board member thought Ms. Park had 17 past violations. Another said she had been "before" them 11 times. Another, during the concluding discussion repeated his earlier misstatement that a liquor license is a privilege not a right. To point is, there was no meeting of the minds as to what Ms. Park's record was or more importantly, what was the standard to which she and every other applicant are to be held.

In Squire Restaurant v. City of Denver, 890 P2d 164 (Colo. App. 1994) the Court quoted from Elizando v. State, supra,

"...although the hearing officer's integrity is not questioned, in this case as in every other, there is no way for a reviewing court to determine whether a hearing officer has or has not abused his discretion. Without some stated guidelines and specific findings of fact, a judicial review is a hollow gesture."

"...nor is there any assurance that each hearing officer will not, consciously or subconsciously, follow standards quite different from his colleagues." id.

The Court of Appeals would take Ms. Park to task for not always following the rules, yet excuses the Board completely for its failures to follow its rules on several occasions. The excuse the Board's failure to make findings of fact, however, is simply not within the Court's purview. As Judge Tursi once noted in dissent,

"...when findings are mandated, they cannot be ignored..." People in the interest of CJW, 727 P2nd 870. (Colo. App. 1986). See also, H20 engineering Inc. v. Leidys Inc., 799 P2d 432 (Colo. App. 1990).

The lack of meaningful, collective, factual findings by the Board constituted a manifest abuse of discretion.

(b.) Meaningful Standards Lacking

While the Court of Appeals correctly states that the Board's decision is to be upheld unless it is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority; it is also true that such a test cannot be applied in a vacuum. E.g., "good cause" to deny an application is the standard against which the Board's action must be measured in a renewal hearing. I.e., were the issue at hand an appeal involving the Board's denial of a renewal application, the Court would look to see if there was competent evidence to support the Board's finding that "good cause" existed to deny the application (See CRS 12-47-302(1) and Squire Restaurant v. City of Denver, 890 P2d 164 (Colo. App. 1994).

If good cause (based upon certain criteria) is not also the standard in transfer hearings, what is! Without even this basic, primary standard to guide the Board and the applicant, due process will be lacking.

The Court hopefully will state what the standard (burden of proof) for denial of a transfer application is and apply same to the instant matter. To state that the Court must uphold the Board's decision unless it is devoid of evidentiary support simply begs the question.

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"we hold only that municipality must reserve its legislative branch of discretion through the use of written criteria which both adequately inform applicants of the standards and policies to be contemplated by the municipality and adequately guide the licensing authority inarriving at it decision. Aside from any Constitutional consideration, fundamental fairness would seem to require nothing less." See Squire Restaurant v. City of Denver, supra.

Thus, not only must a broad standard be established and followed, the broad standard must be the sum of definitive written criteria. E.g., if the number of violations an applicant has accumulated is important for renewal or transfer purposes, there must be objective, written, published standards established so that all applicants are treated equally and all have notice of the kinds and numbers of "violations" which would result in a denial. Much the same as a licensed driver is made aware of the kinds and numbers of violations which will result in his driving privileges being denied.

Here, no standard was established or utilized by the Board against which it could weigh the "record" of Ms. Park. Indeed, Ms. Park's record might well be exemplary when compared with other, current licensees. Indeed, can this Court say otherwise?

Because the Board lacks standards, it is impossible for a reviewing court to find the Board's action was supported by any competent evidence.

There are at least three tenets of due process. One, a neutral magistrate; two, findings of fact; three, recognized standards to be applied to the issues at hand. Whether the board followed its own rules (which it did not) is of no moment if the rules do not comport with due process. Of course, when the rules are violated, a violation per se of due process would seem apparent.

Here, as the district court found, the magistrate was anything but neutral. The Board was provided the City Attorney's opinion and recommendation prior to the hearing. The city attorney falsely states that the Board had received objections to the transfer request when in reality only letters of support had been received. To compound that error, the Board was not apprised of the letters of support in the city attorney's report made available to them prior to the hearing. The report was totally negative. Obviously, it should have contained the good along with the bad. In a Lockhart v. Board of Education, 668 P2d 959, (Colo. App. 1983), the Court found under analogous circumstances that the prosecutor presenting the matter to the Board made an egregious invasion of the Board's decision making province; in a holding that the prosecutor's extensive influence upon the Board's deliberations resulted in a due process violation.

Here, the prosecutor's inappropriate influence tainted the process from the beginning. His unsolicited preparation of a document improperly ordering Ms.

Park "to show cause" was a total reflection of his own views and directly led to Jayhawk's due process denial.

The Court of Appeals states that Local Rule 4.10 does not prohibit the board members from receiving information regarding the transfer request prior to its scheduled hearing. But the rule clearly states otherwise. The cardinal rule of statutory construction is that a statute which is clear and unambiguous is not subject to interpretation or construction. Husson v. Meeker, 812 P2d 731 (Colo. App. 1991). Rule 4.10 is clear. The Court of Appeals seems to say that the Board can be provided with any derogatory information ex parte prior to the hearing in which they will sit in a quasi-judicial capacity so long as such information is also provided to the applicant. That would be tantamount to providing a jury with the prosecutor's evidence before trial so long as the same information is provided to the parties!

For the Court so say that giving Rule 4.10 its obvious interpretation would lead to an absurd result seems disingenuous. There is nothing absurd about 94withholding from the quasi-judicial board information going to the merits of the issue they will soon address in an open forum. Indeed, if Rule 4.10 did provide for the kind of ex parte contact by the prosecution with the Board as took place in the instant matter, the rule would clearly clash with the requirements of due process.

(c.) Other Procedural Errors

The Court of Appeals inexplicably rejected Jayhawk's contention that Local Rule 16.00 required the amended notice (report) be written on a form supplied

by the state. This is puzzling. The rule is clear. The Court then charges Jayhawk with producing the required report form! That is not Jayhawk's burden. It is enough to establish the violation. There would be no way for Jayhawk to make the state form a part of the record. It was the Board's burden to demonstrate harmless error and they did not. Indeed, it was the accusatory tenor of the board's attorney's ad lib, show cause document that prejudiced the Board. Prejudice can be presumed.

2. Equitable Estoppel

The opinion is completely silent on this important issue. The Court points out that Ms. Park admitted to three violations of selling liquor to minors but doesn't disclose that such violations were spread over 10 entity years at two establishments, the last occurring two and a half years prior to the hearing. Nor does the opinion mention that Ms. Park had been relicensed three times since by the Board.

Nor does the opinion mention that said violations were not committed by Ms. Park herself, but by her employees; or that Ms. Park admitted to same only as part of an agreement with the Board wherein the penalty of a short suspension was stipulated to. Obviously Ms. Park would not have entered into such agreements had she known the Board would later renege on her bargain and attempt to impose, instead, a suspension for a lifetime.

Indeed, each and every violation, substantive or technical, was handled in a negotiated, stipulated manner. The penalty was agreed to by the parties and cannot, in all fairness, be arbitrarily aggravated some

years later after Ms. Park has invested all her remaining resources, including blood, sweat and tears, and the $1400 application fee, in order to open the Dale Street Café. She had every right to expect that the transfer of the restaurant's liquor license would be approved. In fact, Ms. Park was especially confident since she had an attorney and the Board's own clerk assist her with the application.

At oral argument, counsel for the Board told the Court that the doctrine of estoppel does not apply. He was incorrect. Indeed, a municipality is estopped from taking a position contrary to previous representations' reasonably relied upon by a person dealing with the city to her detriment. See P-W Investments Inc. v. City and Westminster, 665 P2nd 1365 (Colo. 1982).

Here, Ms. Park was told if she successfully complied with the terms of the agreements, no additional penalty would be imposed. She complied and she relied. How arbitrary, capricious and unfair to now deny Ms. Park the business she has invested in on the basis of very old negotiated dispositions long ago satisfied.

As stated in Roderick v. the City of Colorado Springs, 193 Colorado 104, 563 P2nd 3, 1977, the doctrine of the equitable estoppel is invoked against public entities to prevent manifest injustice.

The injustice to Ms. Park is obvious.

3. If a Hearing is held on a transfer request, interested parties cannot be excluded.

The Court of Appeals states without citing authority that transfer applications are excluded from the requirement of C.R.S. 12-47-311. This conclusion

has no case law support. This appears to be an issue of first impression.

Local Rule 16.00 mandates that the City Clerk set a public hearing date upon receiving an application for issuance of a license by reason of transfer of ownership. C.R.S. 12-47-311 does not mandate a public hearing in such instance but does not preclude one either. Thus, reading the Local Rule and State Statute together, it is apparent that once a hearing is granted the hearing must be conducted consistent with C.R.S. 12-47-311.

C.R.S. 12-47-311 (5) states,

"(a) At the public hearing held pursuant to this section, any party in interest shall be allowed to be allowed to present evidence and to cross-examine witness.

"(b) As used in subsection (5), 'party in interest' means any of the following: "...an adult resident of the neighborhood under consideration...the owner or manager of a business in the neighborhood under consideration..."

First, the record establishes the property was posted with a notice stating, "...any interested person may appear to be heard, either for or against..."

Further, Local Rule 16.00 requires that notice of the required hearing be posted on the property. It does not state the requirements of the notice posted but Local Rule 6.03, the only local rule addressing such requirements, states that the notice shall be in compliance with C.R.S. 12-47-311. Thus, it is apparent that both the state liquor code and the local rules have

one notice and one procedure with regard to hearings for new licenses, renewals and transfers and that is set forth in C.R.S. 12-47-311.

Further, Local Rule 16.02, also addressing transfers (by operation of law) states that,

"...the Board shall act on the transfer request considering the evidence presented by the applicant and any party in interest..."

Further, Local Rule 11.02 provides that, "any interested party" may appeal the Board's decision to the district court.

It is abundantly clear that the local rules contemplate participation in the hearing by interested parties, interested persons or parties in interest. For the Court to hold otherwise requires a very large stretch.

David Zook, both a resident of the neighborhood and the owner of a business, to wit, the building where the Dale Street Café is located, both orally and in writing requested he be permitted to present evidence and cross-examine witnesses, but was denied by the Board.

Because he was denied the right to participate, prejudice is to be presumed.

Conclusion

Perhaps there is no greater threat to the due process protection of a small business owner than that posed by boards, agencies and other local units of government. This is because neither their legislative

actions nor their quasi-judicial decisions receive the kind of public scrutiny of their state and federal counterparts.

The addage "you can't fight city hall" still rings true for many such citizens who simply cannot afford to do so. Indeed, the process seems almost designed to discourage citizen resistance to arbitrary, capricious and even to outrageous actions by administrative boards intent more on what they can do rather than what they should do. In the instant matter, e.g., this small business owner is forced to bear the expense of transcripts, application fees and legal fees required by six different formal hearings, in attempting to protect her property right to serve a little wine at dinner. It may be more than she can bear.

The action of the Local Liquor Licensing Board was inexplicable, arbitrary and capricious. Granting certiorari in this matter will help provide the scrutiny and oversight that such local boards often lack and emphasize that thy must follow their own rules, the state statutes and the due process requirements of our constitution.

Respectfully submitted,

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